



## **SURFACE TRANSPORTATION BOARD**

### **49 CFR Part 1146**

**[Docket No. EP 762]**

### **Regulations for Expedited Relief for Service Emergencies**

**AGENCY:** Surface Transportation Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Surface Transportation Board (STB or Board) proposes to amend its emergency service regulations. Specifically, the Board proposes to: amend procedures for parties seeking a Board order directing an incumbent carrier to take action to remedy a service emergency; indicate that the Board may act on its own initiative to direct emergency service; modify the informational requirements for parties in emergency service proceedings; shorten the filing deadlines in emergency service proceedings and establish a timeframe for Board decisions; and establish an accelerated process for certain acute service emergencies.

**DATES:** Comments are due by May 23, 2022. Reply comments are due by June 6, 2022.

**ADDRESSES:** Comments and replies should be filed with the Board either via e-filing on the Board's website at [www.stb.gov](http://www.stb.gov), or in writing addressed to: Surface Transportation Board, Attn: Docket No. EP 762, 395 E Street, S.W., Washington, DC 20423-0001. Filings will be posted to the Board's website.

**FOR FURTHER INFORMATION CONTACT:** Jonathon Binet at (202) 245-0368. Assistance for the hearing impaired available through the Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** Pursuant to its broad statutory mandate, the Surface Transportation Board closely monitors the rail industry's service performance.

See 49 U.S.C. 1321, 11145; see also 49 U.S.C. 10101, 11323, 10907. Since late 2013, railroad service challenges impacting a wide range of geographic regions and commodities have occurred periodically. See, e.g., U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4) (STB served Dec. 30, 2014), 80 FR 473 (Jan. 6, 2015); STB Letter to CSX Transp., Inc. Requesting Service Reporting (July 27, 2017); STB Letter to Union Pac. Corp. Requesting Service Outlook (Mar. 16, 2018); STB Letter to Union Pac. Corp. Regarding New Operating Plan (Sept. 20, 2018); Chairman Oberman Letter to NS Regarding Service Issues (Nov. 23, 2021).

In response to service challenges in recent years, the Board has held a series of public hearings to permit interested persons to report on specific service problems, to hear from rail industry executives on plans to address rail service problems generally, and to explore additional options to improve service. One such hearing was held in October 2017 in Washington, D.C., at which a number of shippers observed that the Board’s regulations at 49 CFR part 1146 governing expedited relief for service emergencies are rarely invoked, even in times of serious rail service challenges. See Pub. Listening Session Regarding CSX Transp., Inc.’s Rail Serv. Issues, EP 742, Hr’g Tr. 89:13-22; 90:1; 150:3-14; 196:11-22; 197:1-16; 199:1-9 (Oct. 17, 2017).

Based on these concerns and to better understand the reasons for the lack of use of the Board’s directed service regulations, the Board announced on March 15, 2018, that Board staff would hold informal meetings with interested persons to discuss and gather feedback on the adequacy of the Board’s current regulations regarding emergency service and service inadequacies, and whether and how the current regulations should be modified to offer a more meaningful path to relief. See STB Press Release, No. 18-2

(Mar. 15, 2018).<sup>1</sup> As a result, Board staff met with representatives of a variety of entities representing carrier and shipper interests in the second quarter of 2018. A recurring concern expressed by shipper interests was the amount of time it takes to obtain relief for service failures under the existing procedures and the difficulty of satisfying certain informational burdens. While carrier interests acknowledged that very few emergency-service petitions had been filed, they generally indicated a belief that the existing procedures were sufficient and that the Board's informal Rail Customer and Public Assistance program (RCPA) was helpful in resolving acute service issues.

More recently, the Board announced that it would hold a hearing on April 26 and 27, 2022, on recent rail service problems impacting the network and the recovery efforts involving several Class I carriers.<sup>2</sup> As the hearing notice explained, the Board has heard informally from a broad range of stakeholders about inconsistent and unreliable rail service throughout the network and across commodity groups. These challenges include tight car supply and unfilled car orders, delays in transportation for carload and bulk traffic, increased origin dwell time for released unit trains, missed switches, and ineffective customer assistance.<sup>3</sup> Such service issues, should they continue, could result in an increased need for emergency Board action to meet the needs of the public.

Based on additional review of the feedback received during hearings and the informal stakeholder communications, consideration of the current service problems, and

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<sup>1</sup> While these meetings also included discussion of 49 CFR part 1147 (Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies), this proposed rule only concerns part 1146 (Expedited Relief for Service Emergencies).

<sup>2</sup> Press Release, STB, STB Issues Hearing Notice for Urgent Issues in Freight Rail Service (Apr. 7, 2022).

<sup>3</sup> In light of the consistent and pervasive nature of these service issues, the Board is limiting the comment period to 30 days and the reply period to 15 days rather than the more customary 60-day comment period and 30-day reply period.

further consideration of the current regulations, the Board proposes to modify and update its emergency service rules at 49 CFR part 1146.

### Background

Emergency service orders are designed to preserve rail service where there has been a substantial rail service issue or failure that requires immediate relief. Under 49 U.S.C. 11123(a), the Board may issue an emergency service order where there exists “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier . . . cannot transport the traffic offered to it in a manner that properly serves the public[.]”<sup>4</sup> When the Board determines that such a situation exists, it may: “(1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines; (2) require joint or common use of railroad facilities; (3) prescribe temporary through routes; and (4) give directions for—(A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits;” or, when the service failure is caused by a cessation of service by Amtrak, direct the continuation of operations and related functions. Id. The Board may act on its own initiative or pursuant to a petition, and emergency service may be ordered summarily (i.e., without regard to the Administrative Procedure Act). Id. section 11123(b)(1). Board orders under section 11123 are subject to an initial time limit of 30 days but may be extended up to an additional 240 days if the Board finds that emergency conditions continue to exist. Id. section 11123(a) & (c).<sup>5</sup> The Board’s existing regulations at part 1146 were adopted in

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<sup>4</sup> Under the statute, an emergency situation can be created by “shortage of equipment, congestion of traffic, unauthorized cessation of operations, failure of existing commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation, or other failure of traffic movement,” 49 U.S.C. 11123(a).

<sup>5</sup> In the case of an alternative carrier providing service over an incumbent carrier’s lines, the rail carriers may establish the terms of compensation and operations

1998 following Board hearings held at the request of Congress to examine issues of rail access and competition in the railroad industry. See Expedited Relief for Serv. Inadequacies, EP 628 (STB served Dec. 21, 1998), 63 FR 71396 (Dec. 28, 1998).<sup>6</sup>

The current regulations at 49 CFR 1146.1(a) provide, in relevant part, that a petitioner seeking relief must show a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier. Any petition for relief must demonstrate that the standard contained in 49 CFR 1146.1(a) is met, provide a summary of discussions the petitioner has had with the incumbent carrier regarding the service problems and the reasons why the incumbent is unlikely to restore adequate rail service within a reasonable period of time, and include a commitment from an alternative carrier to provide service that can be performed safely without degrading service to existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service.<sup>7</sup> 49 CFR 1146.1(b). A reply to the petition must be filed by the incumbent carrier within five business days, and a rebuttal by the party requesting relief may be filed within three business days following submission of the reply.

#### Proposed Amendments

The proposed amendments, which would change the Board's regulations at 49 CFR part 1146, are set out below. The amendments aim to address several concerns

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between themselves. The Board may set compensation if the carriers do not agree. 49 U.S.C. 11123(b)(2).

<sup>6</sup> In Expedited Relief for Service Inadequacies, the Board also adopted regulations at part 1147 designed to address service issues that require longer-term relief. Id. at 6. At this time, the Board is not proposing modifications to the regulations at part 1147, which are based on 49 U.S.C. 11102 and 10705 rather than section 11123.

<sup>7</sup> Current regulations also require that a petition for relief include a "certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration." 49 CFR 1146.1(b)(1)(iv).

with part 1146 that appear to diminish the ability of stakeholders to invoke the Board's processes when they are most needed—during service emergencies that require immediate regulatory intervention. If stakeholders are unable or unwilling to pursue such remedies due to shortcomings of the current regulatory framework, unaddressed service emergencies create substantial negative impacts on the public. As discussed above, proponents of a rule modification have generally indicated that the current process takes too long and places burdens on petitioners that are difficult to meet, even when the emergency is acute.

In proposing these modifications, the Board is mindful that rail service adequacy is a key part of the Board's mandate. See, e.g., U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4), slip op. at 5 (STB served Nov. 30, 2016), 81 FR 87472 (Dec. 5, 2016) (citing 49 U.S.C. 10101). Pursuant to the rail transportation policy of 49 U.S.C. 10101, in regulating the railroad industry, it is the policy of the United States Government to promote a safe and efficient rail transportation system, section 10101(3); ensure the development of a sound rail transportation system to meet the needs of the public, section 10101(4); foster sound economic conditions in transportation, section 10101(5); and provide for the expeditious handling and resolution of all proceedings, section 10101(15). Poor rail service can harm productivity in important sectors of the economy and can have significant ripple effects throughout the rail network, both of which undermine sound rail transportation and economic conditions. The proposed rule changes would advance the rail transportation policy goals by enabling the Board to order temporary relief in emergency situations more quickly and effectively, to more rapidly ensure that localized problems do not spread to other parts of the network, and to give parties involved in emergency situations (both rail carriers and shippers) more certainty on the resolution of those issues.

Clarifying Remedial Pathways. During the Board's stakeholder meetings in 2018, several stakeholders expressed uncertainty regarding whether, under part 1146, the Board can simply direct incumbent carriers to take particular service actions without involving an alternative carrier. This uncertainty appears rooted in the fact that the Board's current regulations focus on the prescription of rail service by an alternative carrier, requiring that any petition for relief contain, among other things, "a commitment from another available railroad to provide alternative service that would meet current transportation needs." 49 CFR 1146.1(b)(iii). Under 49 U.S.C. 11123, however, the Board is clearly authorized to issue an emergency service directive without regard to whether an alternative carrier is available or necessary to remedy the particular issue. See 49 U.S.C. 11123(a)(1) (the Board may direct the handling, routing, and movement of a rail carrier's traffic over its own lines). Certain circumstances (e.g., an emergency situation with substantial adverse effects on shippers caused by a severe and unreasonable delay in the delivery of railcars that are in the custody of an incumbent carrier) may necessitate requiring an incumbent carrier to undertake immediate actions that it has not performed, particularly in situations where service by an alternative carrier is not a viable option. Indeed, the Board has in the past issued service orders directed at incumbent carriers. See, e.g., Canexus Chems. Can. L.P. v. BNSF Ry.—Emergency Serv. Ord., FD 35524 (STB served Oct. 14, 2011) (requiring incumbents to maintain service pursuant to section 11123). To address any confusion regarding this issue, the Board proposes adding language to 49 CFR part 1146 to parallel the statute and indicate that the Board may direct an incumbent carrier to take action as well as direct an alternative carrier to provide service.

The Board also proposes adding language to 49 CFR part 1146 to clarify that it can act on its own initiative as well as pursuant to a petition. Rail service problems come to the Board's attention in several ways in addition to by petition, such as through the

Board's review of performance service data submitted by carriers under 49 CFR part 1250 or stakeholder testimony at service-related hearings, and the Board has the express statutory authority to act on its own initiative when warranted. See 49 U.S.C. 11123(b)(1).

Both of these proposed changes to the Board's emergency service regulations would better align the Board's regulations with its statutory authority and provide clarity to stakeholders on the pathway for seeking relief in emergency situations.

Modifying Petition Requirements. Currently, under 49 CFR 1146.1(b)(1)(iii), a petitioner must have a commitment from another available railroad to provide alternative service and explain how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service.

Proponents of a rule modification have expressed frustration with the requirement to secure an alternative carrier in advance (i.e., a commitment to be included in a petition) during a service emergency. These proponents report that potential alternative carriers are reluctant to participate in emergency alternative service (1) because taking on new business for a short and unknown period of time can be unattractive financially, (2) for fear of retaliation by the incumbent carrier (particularly where the alternative carrier is a railroad that depends on an ongoing working relationship with the incumbent), and (3) due to uncertainty in ensuring that alternative service can be provided safely and in accordance with applicable regulations and operating practices. In the 1998 decision adopting the part 1146 rules, the Board considered similar concerns but ultimately decided to require the advance commitment of a willing alternative carrier, on the basis that to do otherwise "could create safety concerns, impair service to [the alternative carrier's] customers, or hurt its finances." Expedited Relief for Serv. Inadequacies, EP 628, slip op. at 11. While the Board recognizes that these are important



considerations, it is more appropriate for the Board to take any such concerns into account when considering individual requests for emergency service. Requiring an advance commitment from an alternative carrier as a condition to filing an emergency service petition is not a needed burden on petitioners experiencing a service crisis and undermines the usefulness of this important statutory remedy.

The Board therefore proposes changes that will ease this burden by requiring petitioners to submit only a list of possible alternative carriers, based on the petitioner's understanding of other rail carriers' nearby operations. This modification would still allow the Board, with some initial guidance from the petitioner, to determine whether a suitable alternative carrier may be available based on individual circumstances, thereby allowing a petitioner to focus on providing readily available information regarding its service emergency to the Board as expeditiously as possible. While the informational burden on the petitioner would be lessened, the Board would encourage petitioners to include any information available to them that would assist the Board in determining what, if any, relief is available and appropriate.

Proponents of a rule modification have also identified challenges with the requirement that an emergency service petition explain how alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the overall ability of the incumbent carrier and alternative carrier, if any, to provide service, given that such information is entirely within the control of the alternative and incumbent carriers. Some proponents also suggested that requiring the petition to explain the reasons why the incumbent carrier is unlikely to restore adequate rail service within a reasonable period of time poses too onerous a burden. The Board is proposing changes to these requirements. First, as discussed below, the Board proposes to require the incumbent carrier and alternative carriers, if any, to address, in the first instance, whether the proposed remedy would

substantially impair their ability to serve their customers adequately or fulfill their common carrier obligations. Second, with regard to the required explanation of reasons why the incumbent carrier is unlikely to restore rail service, the Board proposes to clarify that the explanation need only take the form of a “summary” to the extent that such information is available to the petitioner.

The Board proposes these changes because it agrees that the current regulations do not place the informational requirements on the parties most likely to have the information. Given that these proceedings occur on an emergency, expedited basis without traditional discovery, requiring the petitioner to provide detailed information at the outset of a matter could limit access to the Board. Accordingly, because operational information of the incumbent carrier is not readily accessible to a petitioner, and because relevant facts in this regard will be within the incumbent carrier’s control, the Board proposes requiring the incumbent carrier to address in its reply whether, and if so, why, the remedy proposed by the petitioner would be unsafe or infeasible or will substantially impair the incumbent’s ability to serve its other customers or fulfill its common carrier obligations. For the same reasons, the proposed rule would allow any identified possible alternative carrier to file a reply to the emergency service petition and would require such filings to set forth any known problems or concerns perceived by the possible alternative carrier regarding the alternative service.<sup>8</sup> These changes would allow the entity with the most knowledge about its operations to explain to the Board why a proposal regarding its operations is unsafe or infeasible, or would unreasonably impair its ability to serve other customers or fulfill its common carrier obligations.

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<sup>8</sup> Should it need information from any possible alternative carrier that does not file a reply, the Board will take appropriate action, including directly contacting possible alternative carriers to request such information.

Modifying the Regulatory Timeframe. Stakeholders have also expressed concern about the overall length of the process set forth in part 1146, as well as the lack of a date certain by which a Board decision can be expected, both of which the Board agrees can be detrimental to a petitioner's business planning in the midst of a service emergency. See, e.g., Pub. Listening Session Regarding CSX Transp. Rail Serv. Issues, EP 742, Tr. 89-90, 199, Oct. 11, 2017. Therefore, in order to resolve emergency service matters more efficiently and expeditiously, the Board proposes (1) shortening the filing deadlines set forth in part 1146 and (2) establishing a target timeframe for a Board decision on the petition. The reply period for an incumbent or any alternative carrier to respond to a petition under § 1146.1(b)(2) would be reduced from five business days to three, and the rebuttal period under § 1146.1(b)(3) would be reduced from three business days to two. Additionally, the Board proposes language stating that it expects to issue a decision within five business days after receiving the rebuttal. By shortening the timeframe and indicating when the parties can expect a decision by the Board, the proposed amendments would further streamline the process for all parties involved in an emergency service proceeding.

Establishing an Accelerated Process to Handle Acute Service Emergencies. The most serious issue identified by stakeholders was the timeliness of regulatory action in situations involving acute service emergencies, such as those involving public health or safety issues and imminent and extended potential plant shutdowns. In an effort to more efficiently address the most urgent service emergencies in a more expeditious manner, the Board proposes to establish an accelerated process for certain acute service emergencies that present potential imminent harm and threaten potentially severe adverse consequences to the petitioner, its customers, or the public. Such emergencies would arise when there is a clear and present threat to public health, safety, or food security, or a high probability of business closures or immediate and extended plant shutdowns.

The Board seeks comment on a separate accelerated process, set out below in proposed new § 1146.2, whereby a petitioner seeking accelerated relief must indicate that the petitioner is seeking such relief pursuant to that process, include a description of specific and particularized actions that can be performed by the incumbent or an alternative carrier and ordered by the Board,<sup>9</sup> and demonstrate that the described emergency presents an imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. To satisfy this standard, the petitioner must demonstrate that the alleged harm will occur before any relief could be ordered under § 1146.1 and that any relief ordered by the Board pursuant to § 1146.1 would be rendered ineffective. As noted above, such severe adverse circumstances exist when there is a clear and present threat to public health, safety, or food security, or a high probability of business closures or immediate and extended plant shutdowns.

The petition must also include a description of any efforts taken to resolve the issue through others means, such as utilizing the Board's rail customer and public assistance program (RCPA) or direct discussions with the incumbent railroad. The description must be verified by a person (or persons) with firsthand knowledge of the efforts. In this regard, the newly proposed accelerated process would not be intended to supplant the informal assistance readily available through the RCPA office. The RCPA program offers stakeholders a fee-free and confidential forum through which they can resolve disputes. The Board finds that RCPA has been quite effective in working directly with railroads to resolve critical-need situations. It may be the case that a stakeholder has availed itself of the auspices of the RCPA program but has been unable to secure a

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<sup>9</sup> The statute limits the Board's emergency service authority to the actions enumerated in 49 U.S.C. 11123(a), which are listed above. Accordingly, any relief ordered through the accelerated process must be one of the actions listed in the statute.

resolution of its problem, necessitating its pursuit of formal recourse before the Board. Nonetheless, the Board is concerned with the effects of an accelerated process on the Board's informal dispute resolution processes, and it proposes a requirement that a petitioner make a good faith effort to informal dispute resolution prior to filing.

Under § 1146.2, a petition would be limited in length to three substantive pages (not including cover page, verifications, or certificate of service). The petitioner would be allowed the opportunity during a telephonic or virtual hearing to present further evidence in support of its petition.

A petition seeking accelerated relief would be assigned to a designated Board Member for initial resolution. The designation of which Board Member would evaluate any petition submitted under the accelerated process would rotate on a quarterly basis. If the designated Board Member is unavailable, the next Board Member in the rotation would be assigned to evaluate the petition. Upon receipt of the petition for accelerated relief by the designated Board Member, the Board would notify the parties regarding a telephonic or virtual hearing to be held no sooner than 24 hours after receipt of the filing, but no later than 48 hours after receipt of the filing or as soon thereafter as logistically possible. Given the accelerated process, oral replies to the petition would occur during the hearing and there would be no period designated in the schedule for written replies, although the rule contemplates that the Board Member may order the carriers to submit, or the carriers may voluntarily submit, an alternative plan to address the emergency situation within 24 hours of the hearing. The Board expects that the designated Board Member would issue an initial decision on the merits of the petition requesting accelerated relief within two business days after completion of the hearing.

An initial decision on the merits of the petition requesting accelerated relief issued by the designated Board Member may be appealed to the entire Board pursuant to 49 CFR 1115.2. An appeal will not stay the effectiveness of the initial decision, but the

Board proposes to expedite its appellate timeframe and require any petition for a stay of the initial decision to be filed concurrently with the appeal. The record of this new proceeding would include the confidential, unredacted recording of the hearing from the accelerated proceeding.

The Board has concerns as to whether an accelerated process would allow the Board sufficient information by which to ascertain whether its order would impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations. 49 U.S.C. 11101, 11123(c)(2). As such, the Board is proposing a requirement that any relief clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations. The Board will not award relief unless it is clear, based on the limited record, that it will not have an overall negative affect on shippers and that it will avoid any risk of placing other shippers in similar circumstances as petitioner. Given the accelerated nature of this process, the Board also proposes a time limit for relief of 20 days. This should provide sufficient time to allow petitioners to file a case under 49 CFR 1146.1, which would involve a more extended evidentiary process, for relief in effect up to 240 days, if necessary.

If an accelerated petition is denied for failure to satisfy the standard for accelerated relief, the petitioner may choose to appeal that ruling to the entire Board, or the petitioner may file a new petition pursuant to 49 CFR 1146.1 regarding the same service emergency.

The Board believes that this proposed accelerated process will improve and streamline the petition process to address the most critical service emergencies and strikes an appropriate balance between the need to act quickly in such situations and maintaining adequate due process for the involved carriers, but the Board specifically seeks comment on changes to the proposed regulations to afford carriers the opportunity

to provide information on the effects on their networks while maintaining the accelerated nature of the process.

### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant economic impact of a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities, (2) analyze effective alternatives that may minimize a regulation's impact, and (3) make the analysis available for public comment. Sections 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities," section 605(b).

Because the goal of the RFA is to reduce the cost to small entities of complying with Federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board's proposed changes to its regulations here are intended to improve and expedite its directed service procedures and do not mandate or circumscribe the conduct of small entities. For the purpose of RFA analysis for rail carriers subject to the Board's jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 CFR part 1201, General Instruction 1-1. See Small Entity Size Standards Under the Regul. Flexibility Act, EP 719 (STB served

June 30, 2016), 81 FR 42566 (June 30, 2016).<sup>10</sup> The changes proposed here are largely procedural and would not have a significant economic impact on the Class III rail carriers to which the RFA applies. Affected shippers or railroads may seek the relief under part 1146 and the proposed changes, if promulgated, would enable the Board to provide temporary relief from serious, localized service problems more quickly and effectively. Therefore, the Board certifies under 5 U.S.C. 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of RFA. The proposed rules, if promulgated, would modify and clarify its regulations regarding directed service procedures.

#### Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-3521, Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), and in the Appendix, the Board seeks comments about the impact of the collection for the Directed Service Regulations (OMB Control No. 2140-XXXX), concerning: (1) whether the collections of information, as added in the proposed rule, and further described below, are necessary for the proper performance of the functions of the Board, including whether the collections have practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

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<sup>10</sup> Class III carriers have annual operating revenues of \$40.4 million or less in 2019 dollars. Class II rail carriers have annual operating revenues of less than \$900 million but more than \$40.4 million in 2019 dollars. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds in decisions and on its website. 49 CFR part 1201, General Instruction 1-1; Indexing the Annual Operating Revenues of R.R.s., EP 748 (STB served July 12, 2021), 86 FR 36590 (July 12, 2021).



The Board estimates that the proposed requirements would have a total hourly burden of 2,710 hours. There are no non-hourly burdens associated with these collections. The Board welcomes comment on the estimates of actual time and costs of the collection of (a) petition for relief (b) petition to terminate relief, (c) petition for accelerated relief, (d) appeal to entire board, and (e) stay of relief, as detailed in the Appendix. Other information pertinent to these collections is also included in the Appendix. The proposed rule will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11. Comments received by the Board regarding these information collections will be forwarded to OMB for its review when the final rule is published.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.
2. Comments are due by May 23, 2022. Reply comments are due by June 6, 2022.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
4. This decision is effective on its service date.

Decided: April 22, 2022.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, part 1146 of the Code of Federal Regulations as follows:

**PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES**

1. The authority citation for part 1146 continues to read as follows:

Authority: 49 U.S.C. 1321, 11101, and 11123.

2. Revise § 1146.1 to read as follows:

**§1146.1 Prescription of alternative rail service or directed action by an incumbent carrier.**

(a) *General.* Alternative rail service, or directed action by an incumbent carrier, will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. In prescribing the relief described in this part, the Board may act on its own initiative or pursuant to a petition.

(b) *Procedures--(1) Petition for relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

- (i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;
- (ii) A summary of both the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with the petitioner's current transportation needs within a reasonable period of time;

(iii) In a petition that seeks alternative rail service, identification of at least one possible rail carrier to provide alternative service, based on the petitioner's understanding of other rail carriers' nearby operations, that would meet the current transportation needs of the petitioner;

(iv) A detailed explanation of the specific remedy that is being sought; and

(v) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, any proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply.* The incumbent carrier must, and any proposed alternative carrier may, file a reply to a petition under this paragraph (b) within three (3) business days. If applicable, any reply should address whether the specific remedy proposed by the petitioner would be unsafe, or infeasible, or would substantially impair the replying carrier's ability to serve its other customers adequately or fulfill its common carrier obligations.

(3) *Rebuttal.* The party requesting relief may file rebuttal no more than two (2) business days after the reply is filed.

(4) *Board decision.* The Board will endeavor to issue a decision five (5) business days after receiving the rebuttal or time has expired for the party requesting relief to file a rebuttal, whichever is earlier.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d) *Termination of relief*--(1) *Petition to terminate relief*. Should the Board prescribe alternative rail service under paragraph (a) of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carriers are admonished not to file such a petition prematurely.

(2) *Reply*. Parties must file replies to petitions to terminate filed under this paragraph (d) within five (5) business days.

(3) *Rebuttal*. The incumbent carrier may file any rebuttal no more than three (3) business days later.

(e) *Service*. All pleadings under this part shall be served by e-filing on the Board's website, by hand, or overnight delivery on the Board, the other parties, including any proposed alternative carrier, and the Federal Railroad Administration. Decisions issued on the Board's own motion shall also be served by hand or overnight delivery on the Federal Railroad Administration by the Board.

3. Add § 1146.2 to read as follows:

**§1146.2 Accelerated process.**

(a) *Accelerated process*. After making a good faith effort to resolve its service issue through an informal dispute resolution process or service of the Board, affected shippers or railroads may seek accelerated temporary interim relief for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier that presents potential imminent significant harm and threatens potentially severe adverse consequences to the petitioner, its customers, or the public. Such emergencies exist when there is a clear and present threat to public health,

safety, or food security, or a high probability of business closures or immediate and extended plant shutdowns. The timing of such potential harm and consequences must render potential relief under §1146.1 ineffective. The relief requested must clearly avoid any substantial impairment of the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.

(1) *Standard.* A petitioner seeking accelerated relief must indicate in its petition that it is seeking such relief pursuant to this paragraph (a) and must demonstrate circumstances that meet the standard set forth in this paragraph (a). The petition must include a description of specific and particularized action that could be performed by the incumbent or an alternative carrier and ordered by the Board. The petition must also include a summary description of the efforts taken to resolve the matter prior to filing the petition. The description must be verified by a person or persons with knowledge of the efforts taken to resolve the matter. The petition must include contact information for the incumbent carrier. The petition will be limited to three (3) substantive pages, not including the cover page, verifications, or certificate of service.

(2) *Hearing.* When the Board receives a petition seeking accelerated relief under this paragraph (a), the petition will be assigned to a designated Board Member to be evaluated on its merits. The designation of which Board Member will evaluate the petition under the accelerated process will rotate on a quarterly basis. If a petition is filed and the designated Board Member is unavailable to evaluate the petition, the next Board Member in the rotation will evaluate the petition.

(i) After the designated Board Member receives the petition for accelerated relief, a telephonic or virtual hearing will be held no sooner than 24 hours after receipt of the filing, but no later than 48 hours after receipt of the filing, if practicable.

(ii) Required parties for the hearing include the petitioner(s), the incumbent carrier, any potential alternative carriers, and any other parties deemed necessary by the designated Board Member. The designated Board Member may deem that portions of the hearing will be closed to certain parties if confidential business information needs to be discussed. The hearing will be recorded and later transcribed (with redactions, if necessary), and placed in the public docket of the proceeding.

(iii) If applicable, the incumbent carrier shall address at the hearing whether the remedy proposed by the petitioner is unsafe, infeasible, or will unreasonably impair the replying carrier's ability to serve other customers. The Board Member may order the incumbent carrier to submit, or if no such order is issued, the incumbent carrier may choose to submit, within 24 hours of the completion of the hearing, an alternative service plan for the Board Member to consider. The Board Member may choose to receive such information either via written submission or a second virtual or telephonic hearing, if practicable.

(3) *Board decision.* The designated Board Member will endeavor to issue an initial decision on the merits of the petition requesting accelerated relief within two (2) business days of the completion of the hearing. The Board Member shall not award relief for more than 20 days.

(b) *Right to appeal.* After the designated Board Member issues an initial decision on the merits of the petition requesting accelerated relief, the decision can be appealed to the entire Board. The appellate record is to include any filings by the parties in the proceeding and the unredacted recording of the hearing. The appeal will be subject to 49 CFR 1115.2 except that the filing of an appeal will not stay the effect of the initial decision, and appeals must be filed within five (5) days after the service date of the

decision or within any further period the Board may authorize; and replies must be filed within five (5) days of the date the appeal is filed.

(c) *Stay of relief.* Parties seeking a stay of the relief issued by the designated Board Member must concurrently file an appeal of the decision and a petition to stay.

(d) *Exempted from 49 CFR part 1116.* The accelerated petition process under §1146.1(c) is exempted from 49 CFR part 1116.

(e) *Service.* All pleadings under this part shall be served by e-filing on the Board's website, by hand, or overnight delivery on the Board, the other parties, and the Federal Railroad Administration. All pleadings under this part shall also be e-mailed to ServiceEmergency@stb.gov.

Note: The following appendix will not appear in the Code of Federal Regulations.

## APPENDIX

### **Information Collection Under the Paperwork Reduction Act**

As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-3521, the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the information collection, Directed Service Regulations, encompassing (a) petition for relief (b) petition to terminate relief, (c) petition for accelerated relief, (d) appeal to entire board, and (e) stay of relief. The proposed new collection necessitated by this notice of proposed rulemaking is expected to provide parties with additional options for resolution of smaller rail rate disputes and will further the Board's policy favoring the use of mediation and arbitration procedures.

**Description of Collection**

*Title:* Directed Service Regulations

*OMB Control Number:* 2140-XXXX

*STB Form Number:* None

*Type of Review:* Collection without an OMB Control Number

*Respondents:* Parties seeking to have the Board direct rail service and rail carriers relating to such service

*Number of Respondents:* 30

*Estimated Time Per Response:*

**Estimated Hours per Response**

Type of filing	Number of hours per response
Petition for Relief	140
Petition to Terminate Relief	50
Petition (accelerated relief)	70
Appeal to Entire Board	50
Stay of Relief	40

*Frequency:* On occasion

**Estimated Average Annual Number of Responses**

Type of filing	Number of responses
Petition for Relief	10
Petition to Terminate Relief	2
Petition (accelerated relief)	12
Appeal to Entire Board	5
Stay of Relief	3



*Total Burden Hours* (annually including all respondents): 2,710 (sum of estimated hours per response x number of annual responses for each type of filing)

Total Annual Burden Hours

Type of filing	Hours per response	Annual number of filings	Total annual burden hours
Petition for Relief	140	10	1,400
Petition to Terminate Relief	50	2	100
Petition (accelerated relief)	70	12	840
Appeal to Entire Board	50	5	250
Stay of Relief	40	3	120
Total Annual Burden Hours			2,710

*Total Annual “Non-hour Burden” Cost:* There are no non-hourly burden costs for this collection. The itemized collections may be filed electronically.

*Needs and Uses:* Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, the Board is responsible for the economic regulation of common carrier rail transportation. Under 49 CFR part 1146, and as described in detail above, affected shippers or railroads may file a petition for relief before the Board when there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. It must include a full explanation and supporting evidence, a summary of discussion with the incumbent carrier and why it is unlikely to restore adequate service, identification of alternative rail service (if sought), the specific and detailed remedy being sought, and certification of service. If the Board prescribes alternative rail service, then the incumbent carrier may file a petition to

terminate that relief, containing a full explanation with supporting evidence that it is providing adequate service.

In addition to the petition for relief, affected shippers or railroads may seek accelerated temporary interim relief for substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier that presents imminent significant harm and threatens potentially severe adverse consequences. This petition for accelerated relief must contain the specific action that could be performed by the incumbent or an alternative carrier and the efforts taken to resolve the matter (all limited to three substantive pages). Once received, a Board Member will be designated to evaluate the petition's merits and a telephonic hearing will be held with the parties and the Board Member will make an initial decision on the petition. A party may then file an appeal of the initial decision to the entire Board. Finally, because the appeal will not stay the relief granted in the initial decision, a party may file for a stay of the relief. All filings must be served on the other parties. These are the steps that provide for the collection of information under the PRA.

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